

to those of a President or a Magistrate and who has direct access to investigation papers of criminal cases, it is undesirable in the circumstances for him to sit on the Bench and continue the trial part-heard by him. The succeeding President or Magistrate will have to exercise his powers by invoking section 261.

The position of Senior Federal Counsel is, to my mind, slightly different, especially those who are attached to Federal Ministries and Departments. Their main duty is to give legal advice. Similarly, in the case of Encik Shaari. He is Legal Adviser to the Royal Customs & Excise and if there is any court work he has to perform occasionally, that will be confined to arguing criminal appeals in the High Courts in Customs and Excise cases. His position is unlike that of a Deputy Public Prosecutor in the States. There should therefore be no likelihood of offending the principles if he continues the part-heard case. Nevertheless, that ought to be rarely exercised and only in exceptional cases as the present case.

When I say the present case falls within the exceptional cases, I refer to the facts and surrounding circumstances and the probable effect caused by them. Firstly, the 6th accused was arrested on September 24, 1975 and was first produced in court on September 25, 1975. The first charge preferred against him under section 8 of the Firearms (Increased Penalties) Act, 1971, carries a maximum penalty of imprisonment which may extend to 14 years and with whipping with not less than six strokes. The second charge under section 9(a) of the Arms Act carries a penalty of imprisonment for a term not exceeding seven years or to a fine not exceeding \$10,000 or to both such imprisonment and fine. The charges, especially the first, are serious. Secondly, the accused has been remanded in custody ever since arrest and though allowed bail at one stage on December 30, 1975, was again remanded in custody when the bailors were discharged on February 22, 1976 until now. He has been produced weekly in court on countless occasions until the case was part-heard by Encik Shaari and also thereafter. From the date of arrest until now the accused has been in custody for nearly two and a half years! I just cannot imagine any good reason for such a state of affairs to be allowed to happen without the case being heard and disposed of earlier.

Next comes the trial proper by Encik Shaari. He commenced hearing on February 21, 1976, heard two prosecution witnesses and continued hearing on May 16, 1976 when the prosecution closed their case after calling nine witnesses. In the course of the trial up to the prosecution stage Encik Shaari admitted a statement made by the 6th accused to the Police after holding a trial within a trial, made an order of acquittal and discharge on six of the accused persons and called upon the 6th accused to enter upon his defence on both charges. The circumstances are such that if the trial is ordered to be heard *de novo* or be commenced by the succeeding President from the stage heard by Encik Shaari, it will affect (i) the six accused persons who are already acquitted and discharged, (ii) the trial within a trial in which the statement by the 6th accused has been admitted because apparently the prosecution witnesses concerned will have to be re-

A called for their evidence to be recorded, and (iii) also the order for calling the defence of the 6th accused made by Encik Shaari, not to mention the very long lapse of time as stated above, in which case the witnesses might have forgotten most of the evidence. Moreover, Mr. Karpal Singh has applied for the six co-accused to be subpoenaed as defence witnesses, and made no objection at that time for Encik Shaari to continue with the hearing of the case, until the second occasion when Encik Shaari had come from Kuala Lumpur for the same purpose.

B I therefore take the view for the reasons stated above, Encik Shaari should continue to hear the case which he has past-heard. I also make an order, which is necessary here, that there must not be any more adjournments and that Encik Shaari should complete hearing the case as soon as practicable from the date that he has fixed for continuation.

Order accordingly.

Solicitors: *Karpal Singh & Co.*

TAN SIEW GAIK v. LOKE POH SEONG

[O.C.J. (Syed Agil Barakbah J.) April 8, 1978]

[Alor Star — Civil Suit No. 168 of 1966]

E *Contract — Agreement to sell land — Breach of — Land sold smaller than area agreed — Claim for specific performance or damages.*

Evidence — Written agreement to sell a piece of land — Subsequent oral agreement between parties — Whether admissible — Evidence Act, 1950, s. 92.

F The plaintiffs, administrators of the estate of the deceased, claimed for specific performance of a written agreement for the sale of land or damages for breach of contract against the defendant. The deceased had, under the written agreement, purchased 21,000 sq. ft. of land for \$5,500 from the defendant. Subsequently, however, the deceased had discovered that of the 21,000 sq. ft. of land only 19,439 sq. ft. of land were transferred. The difference in portion of 1,561 sq. ft. of land had been sold as Lot No. 1438 to two other purchasers. The defendant contended that by a subsequent oral agreement the deceased had accepted the lesser portion in full satisfaction and discharge of the total purchase price of \$5,500. G The plaintiffs, on the other hand, claimed that the deceased agreed to accept the transfer on the condition that the portion in dispute was to be utilised as a public road for the housing project.

The issue before the court was whether the oral agreement between the deceased and the defendant made subsequent to the written agreement was admissible under section 92 of the Evidence Act.

H **Held**, allowing the plaintiffs' claim: (1) the oral agreement did not contradict, vary, or subtract from, nor add to, the terms of the document of transfer within the meaning of section 92 of the Evidence Act. It was a stipulation which was unconnected with the document and was not an addition of the kind as envisaged by section 92;

(2) the plaintiff was entitled to damages for breach of contract since Lot 1438 had been sold by the defendant, to third parties.

Case referred to:-

(1) *Lebai Taib v. Abdul Gani & Anor.* [1973] 1 M.L.J. 109.

CIVIL SUIT.

Eugene Khoo for the plaintiffs.

Albert S.C. Hoe for the defendant.

Syed Agil Barakbah J.: The plaintiff's claim is for specific performance of a written agreement dated March 17, 1953 for the sale of a piece of land at Bakar Arang, Sg. Pasir, Kuala Muda measuring 70 feet by 300 feet (hereinafter called the "said land") or alternatively, for damages for breach of contract and costs.

This suit was carried on by the administrators of the estate of the deceased plaintiff (hereinafter called "the deceased") by Order of Court dated April 24, 1976.

Mr. Eugene Khoo appeared for the plaintiff and Mr. Albert Hoe for the defendant.

The main issues relate to the written agreement (Exhibit D7) which states *inter alia* the sale of the said land adjacent to the Chinese "Loh Chia Kong" temple is subject to the sub-division of the whole of the vendor's land, comprising a bigger area earmarked for a housing project by the Government. The cost of the said land amounting to \$5,500 as the full purchase price was paid by the deceased and receipt thereof acknowledged by the defendant on the date of the execution of the agreement. Lastly, the transfer of the said land by the defendant to the deceased was to be effected when the whole land had been sub-divided and when the title deed of the sub-division was ready. Sometime on March 30, 1965, a transfer of the said land (Lot 1439) by the defendant in favour of the deceased was duly executed, but the area so transferred was smaller by more or less 1561 sq. ft. (Exhibit D4). Instead of 21,000 sq. ft., only 19,439 sq. ft. was transferred. Subsequently through his solicitors, the deceased discovered that the smaller portion, situated to the rear of the portion so transferred, had been sold by the defendant to two other purchasers as Lot No. 1438. (See page 7 of Exhibit A). The latter through their solicitors served notice on the deceased to vacate the lot and demolish the building thereon.

At the commencement of the proceeding, a preliminary issue on point of law was raised. However, both counsel conceded that there was a subsequent oral agreement between the parties after the sub-division on October 4, 1965 that the said land was transferred to the deceased by the defendant less the portion stated above. The terms of the agreement which are disputed are discussed below. The only two issues left to be considered are:—

1. Whether the portion Lot 1438 was taken up by the Government for public roads involved in the subdivision; and
2. Whether the deceased accepted the lesser area (Lot 1439) in full satisfaction and discharge of the purchase price of \$5,500.

The answer to the first issue is clearly in the negative, as admitted by the defendant. According to the plaintiff, she and her husband (the deceased) commenced occupation of the whole area after it was pegged with the help of the defendant. They then erected a temporary building at the rear portion. Subsequently it was discovered they were given a lesser area than that agreed upon, after a search in the Land Office. Fur-

ther, according to the first subdivision plan (Exhibit D8), the area at the rear portion of the lot in dispute, approximately 1,600 sq. ft., was marked for a road reserve. However, according to a subsequent plan (Exhibit D9), the road reserve was moved to both sides of the plaintiff's lot, as 20 feet wide and 40 feet wide respectively, and the whole lot including the portion in dispute was marked as Lot 1174 including a site earmarked for a Chinese temple. Subsequently, the deceased's lot was marked as Lot 1439 and the portion in dispute, as Lot 1438 (see page 8 of Exhibit A). Lot 1438 was transferred to the two purchasers by the defendant on September 25, 1965 (see page 7 of Exhibit A). The notice from the purchasers of Lot 1438 was dated January 10, 1966. It is clear therefore the portion in dispute, Lot 1438, was not utilised by the Government as a public road.

With regard to the second issue, the written agreement (D7) clearly states the area sold to the plaintiff (the deceased) by the defendant as 70 feet wide and 300 feet long adjacent to the Chinese "Loh Chia Kong" temple. According to paragraph 4, the whole of the said land is subject to sub-division by the Government and the part to be sub-divided was to be sold to the plaintiff. Paragraph 7 states the transfer is to be effected when the title deed No. 3591 has been sub-divided and the title deeds for sub-division completed.

The question for determination now is whether the oral agreement between the deceased and the defendant made subsequent to the written agreement (D7) is admissible or otherwise under section 92 of the Evidence Act. The point was raised as a preliminary issue after which both counsel conceded there was such an agreement on October 4, 1965, when Lot 1439 was transferred by the defendant to the deceased under the National Land Code. The defendant at paragraph 2 of his statement of defence admitted the existence of the oral agreement maintaining that the deceased accepted the lesser portion in full satisfaction and discharge of the total purchase price of \$5,500. The plaintiff, on the other hand, maintained that her deceased husband agreed to accept the transfer on the condition and understanding that the portion in dispute was to be utilised as a public road for the housing project.

The whole issue rests on facts as to which party is to be believed. However, the legal point in issue has to be determined first.

Now, as regards the written agreement (Exhibit D7), construing Clauses 2 and 4 thereof, it is clear that the transfer of the lot is subject to the completion of sub-division and the issue of separate title deeds. To my mind, the subsequent oral agreement tends to explain the real intention of the parties during the formal transfer of Lot 1439. It does not in any way contradict or vary the terms of the written agreement. If it does by way of addition, it falls under proviso (b) of the Evidence Act as a matter in which the written agreement is silent and is not inconsistent with its terms.

Further, with regard to the document of transfer of Lot 1439, the position is slightly different. Never-

theless, basing on the authority of the Federal Court, as held by Azmi L.P. (as he then was) in *Lebai Taib v. Abdul Ghani & Anor.*,⁽¹⁾ where a similar question arose, I hold that the oral agreement does not contradict, vary, or subtract from, nor add to, the terms of the document of transfer within the meaning of section 92 of the Evidence Act. It is a stipulation which is unconnected with the document and is therefore not an addition of the kind as envisaged by that section.

On the issue of facts, the relevant document of transfer, to my mind, should not be considered in isolation, because of the admission by both parties of the existence of the subsequent oral agreement. The surrounding facts and circumstances have to be taken into account in order to determine whose version is the true one, on the balance of probabilities. It seems to me, according to the plaintiff, the deceased was all the while under the impression that the portion in dispute (Lot 1438) was meant for a road reserve. From earlier correspondence between the solicitors (pages 3 & 5 of Exhibit A) regarding the disputed portion and the assurance from the defendant on December 3, 1965, the position was still the same, i.e. the portion was acquired by the Town Council, Sungai Patani for road construction. No answer was given by the defendant to the letter requiring the particulars of the land so acquired, etc. dated January 4, 1966. It is clear by that time the portion in dispute has already been transferred by the defendant to the two purchasers. (see page 7 of Exhibit A). Next in sequence of events was the letter to the District Officer, Sg. Patani dated June 21, 1966 and the reply from the late D.O. dated July 28, 1966 (pages 3 & 4 of Exhibit B). By that time the plaintiff's husband had come to know of the sale of the disputed portion and he requested the D.O. to arbitrate in the dispute between him and the defendant. The District Officer's letter in reply is self-explanatory.

I am satisfied from the above that the plaintiff's version as corroborated by material points is probable and reasonable, and I accept it as being true.

The defendant's next point was that because the Government has not taken up the portion in dispute (Lot 1438) as a road reserve but roads were constructed along the strips of land on both sides of the plaintiff's lot, he has a right to sell the disputed portion. That was never pleaded at all and was merely a lame excuse. If that was true, he ought to have informed the plaintiff earlier that he intended to dispose of it rather than to maintain that it was to be taken up for a road reserve. The defendant had told a lie. He was argumentative and difficult to control even by his counsel, while in the witness box. He kept changing his evidence and was very evasive.

I therefore give judgment for the plaintiff. The plaintiff is entitled to the alternative prayer for damages for breach of contract, since Lot 1438 has been sold by the defendant. With regard to compensation for 1561 sq. ft. being the area of the Lot, the present Government valuation would be between 80 cents to \$1 per sq. ft. but the market value would be twice or more. However, I took into consideration that the price was only \$5,500 for the whole area containing both Lots 1438 and 1439 as it was earmarked for a

A Chinese temple. In the circumstances, I would assess the value at \$1 per sq. ft. and the damages at \$1,560 as being fair and reasonable. With regard to the cost of the temporary building on Lot 1438, the expenses incurred by the plaintiff in dismantling it including the fencing and the cost for its reconstruction, I would assess it at \$4,000 as being reasonable in the absence of any documentary proof of the actual expenses. In all, the damages that the plaintiff is entitled to is \$5,560. The defendant has since been adjudged a bankrupt and is still undischarged. This judgment should therefore be relayed to the Official Assignee who is responsible for the defendant's estate.

Order accordingly.

Solicitors: Eugene Khoo & Co.; Albert S. Hoe & Co.

CHIN YOON TIMBER CO. v. OVERSEAS LUMBER BHD.

[O.C.J. (Syed Othman J.) April 17, 1978]

[Johore Bahru — Companies (Winding-Up) No. 4 of 1977]

Companies — Winding up — Petition to wind up company — Affidavit verifying petition sworn before the presentation of petition — Objections thereto — Second affidavit filed — Companies (Winding-Up) Rules, 1972, rr. 7(1), 26, 193 & 194.

The petitioner presented a petition to wind-up the respondent company on May 17, 1977. The affidavit verifying the petition was sworn before the presentation of the petition. The respondent objected to the petition and the court allowed an adjournment. Thereafter, the petitioner filed another affidavit verifying the petition.

Held: (1) the principle governing an affidavit is that it must be made in some cause or matter which is actually pending in the court;

(2) in this case there had been a disregard of the rules and therefore the petition should be struck out and a fresh petition should be filed.

Cases referred to:-

- (1) *Re Western Benefit Building Society* (1864) 33 Beav 368.
- (2) *Re The East Cambrian Gold Mining Co.* 12 L.T.R. N.S. 507.
- (3) *Re The London and Westminster Co-operative Store Co.* 17 L.T.R. N.S. 559.

COMPANIES WINDING-UP.

Abdul Razak for the petitioner.

C. Paramjothy for the respondent.

Wong Kim Fatt for the receivers & managers of the company.

Jaafar bin Mat Saman (Federal Counsel) for the Inland Revenue.

Syed Othman J.: The petitioner presented a petition to wind-up the respondent company on May 17, 1977. But the affidavit verifying the petition was sworn on May 4 i.e. before the presentation of the petition. At the first hearing Encik Paramjothy, for the respondent, objected to the petition. I allowed adjournment to enable counsel on both sides to look up the authorities and argue further. The petitioner's side took the opportunity and filed another affidavit verifying the petition, which was sworn on March 12, 1978.